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No. 91-6382

In The

Supreme Court of the United States

October Term, 1991

ROBERT WAYNE SAWYER,

Petitioner,

vs.

JOHN P. WHITLEY, Louisiana State Penitentiary,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF THE RESPONDENT

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QUESTIONS PRESENTED

1. How should the "actual innocence" of the crime standard of *Kuhlmann v. Wilson* be applied to questions of alleged sentencing error in a capital case presented in a successive or abusive habeas corpus petition?

2. Under the standard to be used when determining whether "actual innocence of the death penalty" exception should permit consideration of claims presented in a successive or abusive habeas corpus petition, should the focus be on the objective factors which control the eligibility of the defendant to be considered for a sentence of death?

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BRIEF OF THE RESPONDENT

STATEMENT OF THE CASE

Course of Proceedings Below

The state acknowledges the procedural history as recited by petitioner.

Factual Summary

The following statement of facts is essentially as found in *State v. Sawyer*, 422 So. 2d 95 at 97, 98 (La. 1982) and the trial transcript.

A series of bizarre and frightful events, which led to the death of Fran Arwood, occurred at the residence where defendant was living with Cynthia Shano and Ms. Shano's two young sons. Ms.

Arwood was divorced from Ms. Shano's stepbrother, but remained friendly with her and often helped her by taking care of the children. Defendant had lived with Ms. Shano in Texas for several months and had professed an intention to marry her.

On September 28, 1978, Ms. Arwood was staying with Ms. Shano and helping with the children while Ms. Shano's mother was in the hospital. Defendant and Ms. Shano went out for the evening. Defendant returned at about 7:00 o'clock the next morning with Charles Lane, whom defendant had apparently met in a barroom and had invited to the residence for more drinking and talking.

Defendant and Lane continued their drinking while listening to records. At some time during the morning, Ms. Shano left to check on her hospitalized mother. When she returned, she noticed that Ms. Arwood was bleeding from her mouth. Defendant told Ms. Shano that he had struck Ms. Arwood after an argument in which he accused Ms. Arwood of giving some pills to one of the children.

The reason behind the events that followed are difficult to discern accurately from the record and more difficult to comprehend. However, defendant does not vigorously contest the fact that Ms. Arwood, in his presence, was beaten, scalded with boiling water and burned with lighter fluid, or that the ferocity of the attack and the severity of the injuries caused her to die several weeks later without ever regaining consciousness.

After the original altercation during Ms. Shano's absence, defendant and Lane, for some unexplained reason, decided that Ms. Arwood needed a bath because nobody wanted to look [at] her "funky whory ass" that way. When she resisted defendant kicked her in the back of the head with his shoes which had taps on the ends. Ms. Shano objected, but defendant locked the front door and retained the key, threatening Ms. Shano if she interfered or ever revealed the incident.

Acting in concert, defendant and Lane dragged Ms. Arwood

by the hair to the bathroom, stripped her naked, and literally kicked her into the bathtub, where she was subjected to dunking, scalding with hot water, which defendant actually left the bathroom to boil, while Lane kept a watch over Arwood (a period during which he may have raped Arwood). When defendant returned to the bathroom they administered additional beatings with their fists. A final effort by Ms. Arwood to resist the sadistic actions of her tormentors resulted in defendant's kicking her in the chest, with both of his feet while letting out a yell, causing her head to strike either the tub or the adjacent window sill with such force as to render her unconscious. Although she did not regain consciousness, defendant and Lane continued to use her body as the object of their brutality.

Defendant and Lane dragged her from the bathroom into the living room, where they dropped her, face down onto the floor. While on the floor, defendant walked on her back and Lane kicked her in the ribs. Defendant then beat her with a belt as she lay on the floor. They then placed her on her back on a sofa bed in the living room. As Ms. Shano went to the bathroom, she overheard defendant say to Lane that he (defendant) would show Lane "just how cruel he (defendant) could be". When she reentered the living room, she was struck by the pungent smell of burning flesh. She then discovered that defendant had poured lighter fluid on Ms. Arwood's body (particularly on her torso and genital area) and set the lighter fluid afire. Lane told Shano, as he and Sawyer laughed about it, that his penis had been burned when defendant ignited the lighter fluid while he was having intercourse with the (unconscious) victim. Shano, then heard Sawyer tell Lane, "Nobody told you to stay inside of her while I told you I would show you how hot pussy can get."

Then, displaying a callous disregard for the helpless (and mortally injured) victim, defendant and Lane continued to lounge about the residence listening to records and discussing the disposition of Ms. Arwood's body. Lane fell asleep next to the beaten and swollen body of the victim.

Shortly after noon, Ms. Shano's sister and nephew came to visit. When the nephew knocked insistently, defendant gave Ms. Shano the key to open the door, and she ran screaming to the safety of her relatives. Her excited ravings ("They've killed Fran and they're trying to kill me") were incomprehensible to her nephew and sister until they looked inside and saw the gruesome scene and Ms. Arwood's beaten and blistered body. They also saw defendant sitting with his feet propped up on the edge of the couch.

In the meantime, Ms. Shano called for police and emergency units. When the authorities arrived, they took Lane and defendant to jail, and rushed Ms. Arwood to a hospital, where she subsequently died. *State v. Sawyer, supra* at 97, 98.

Petitioner initially pled not guilty and not guilty by reason of insanity but withdrew that plea and went to trial on a plea of not guilty with a defense of toxic psychosis. Before trial petitioner filed a motion to appoint a sanity commission and to order medical observation and test (JA 339). The two psychiatrists found that petitioner was competent; That he understood the proceedings against him and that he could assist his counsel at trial. (JA 344, Dr. De Viller's report and JA 341, Dr. Arneson's report). Thereafter, petitioner was found guilty of La. R.S. 14:30, First Degree Murder, and sentenced to death by a twelve person jury. He then began the appellate and post-conviction process based on the claims listed below. The aggravating factor in support of the conviction is aggravated arson; the aggravating factors in support of the death sentence are 1) engaged in perpetration of aggravated arson, 2) committed in an especially heinous, atrocious or cruel manner.

Direct Appeal

Sawyer's direct appeal to the Louisiana Supreme Court addressed the following errors, although the Supreme Court reviews all errors and the sentence for excessiveness by considering if it was imposed under the influence of passion, prejudice or any other arbitrary factors:

1. Insufficient evidence to support the aggravated arson as an aggravating circumstance;
2. Insufficient evidence to support aggravated rape as an aggravating circumstance;
3. Introduction of evidence of prior conviction;
4. Introduction of prior indictment for Second Degree murder;
5. Excessive sentence because at least one aggravating circumstance not supported by the evidence.

(JA 5)

Post Conviction Application

Sawyer's questions presented:

I. Violation of La. C.Cr. P. Art. 512, that requires a counsel for a defendant charged with a capital offense to have been admitted to the bar for at least five years;
II. Ineffectiveness of counsel;
III. Denial of constitutional right of petitioner to decide whether or not to testify;
IV. Prosecutorial misconduct in the penalty phase closing argument;
V. Arbitrary factor infecting by prosecutor into jury deliberations by misleading them as to their role in imposing the death sentence;
VI. Failure of trial court to instruct that defendant is not required to testify;
VII. Trial Court's instruction at the guilt-innocence phase regarding the State's burden of proof beyond a reasonable doubt was in error;
VIII. Same as Claim VII;
IX. Trial court excused jurors who expressed only general opposition to the death penalty. (Witherspoon violation);
X. Violation of Eighth Amendment where sentence of death is imposed where one of the aggravating circumstances is not supported by the evidence;

XI. Inadmissable evidence introduced during capital sentencing hearing.
XII. Petitioner was denied a full and fair hearing in all previous state court proceedings (moot);
XIII. Death qualification of petitioner's guilt phase jury was illegal and unconstitutional;
XIV. Comparative appellate review of petitioner's sentence was constitutionally inadequate;
XV. Petitioner's sentence is excessive and disproportionate;
XVI. Petitioner's sentence is arbitrary and capricious;
XVII. Electrocution is a cruel and unusual means of punishment;
XVIII. Petitioner's sentence is invidiously discriminatory;
XIX. Capital Punishment is an excessive penalty;
XX. The cumulative effect of violations of petitioner's rights is in itself a violation of petitioner's constitutional rights.

A hearing was held in the state district court on July 12, 1985, after which these claims were denied with reasons (JA 63,80).

Writ Of Habeas Corpus — United States District Court

Sawyer's claims presented:

1. Improperly death qualified jury;
2. Attorney with less than 5 years violated Equal Protection and Due Process;
3. Ineffective assistance of counsel;
   a) Was admitted to practice for less than five years;
   b) Objected to the prosecutor advising the jury panel during voir dire of the penalties for lesser included offenses;
   c) Failed to object during voir dire to prosecutor's reference to evidentiary facts that were not later established at trial;
   d) Failed to conduct a meaningful voir dire;
   e) Failed to discuss with petitioner the nature of the defense;

   f) Failed to allow petitioner to testify during the guilt phase of the trial;
   g) Failed to adequately prepare defense witnesses for trial;
   h) Failed to call an expert that would have been able to give an opinion as to the effect of alcohol on petitioner;
   i) Did not present a closing argument during the guilt phase of the trial;
   j) Presented an unprepared defense during the penalty phase of trial;
   k) Failed to object or move for mistrial during improper argument by prosecution during penalty phase of trial;
   l) Failed to object to erroneous instructions given the jury by the court during guilt and penalty phase of trial; and
   m) Made an inadequate closing argument during penalty phase of trial.
4. Prosecutorial misconduct at penalty phase;
5. Improper prosecutorial argument;
6. Deprivation of right to testify;
7. Failure of trial court to properly instruct jury at guilt phase of trial;
8. Unconstitutional jury instruction on burden of proof at guilt phase;
9. Unconstitutional jury instruction at guilt phase regarding specific intent;
10. Improper jury excusal;
11. Arbitrary factor introduced at sentencing phase by unsupported aggravating circumstance;
12. Inadmissible evidence at sentencing introduced arbitrary factor;
13. Petitioner's sentence is excessive and disproportionate;
14. Petitioner's sentence is arbitrary and capricious;

15. Electrocution is a cruel and unusual means of punishment;
16. Petitioner's sentence is invidiously discriminatory;
17. Capital punishment is an excessive penalty;
18. The cumulative effect of violations of petitioner's rights is in itself a violation of petitioner's constitutional rights.

The District court denied all of petitioner's claims with written reasons. (JA 86, 141)

Federal Habeas — United States Fifth Circuit

1. Attorney appointed with less than five years admission to bar violated equal protection and Due Process;
2. Ineffective assistance of counsel
   a. failed to ask jurors about their attitudes towards the death penalty during voir dire;
   b. objected to the jury's learning of the mandatory life imprisonment penalty for second degree murder, as well the penalty for manslaughter at the guilt phase;
   c. failed to object to several inadmissible, inflammatory remarks by the prosecutor;
   d. produced no defense experts on the subjects of intoxication and toxic psychosis even though he had chosen them as the basis for the defense to negate the specific intent required for first degree murder;
   e. failed to make closing argument at the guilt phase of trial; and
   f. failed to prepare a competent penalty phase presentation.
3. Improper prosecutorial remarks at the sentencing phase under Caldwell.

After a divided panel of the U.S. Fifth Circuit denied these claims (JA 148) an en banc court affirmed the panel opinion. (JA 208)

Writ Of Certiorari To The United States Supreme Court

1. Whether petitioner was procedurally barred from application of the rule announced in *Caldwell v. Mississippi*, 472 U.S. 320 (1985) by *Teague v. Lane*, 489 U.S. 288 (1989) and *Penry v. Lynaugh*, 492 U.S. 302 (1989).
2. Whether petitioner's remarks, if not barred by *Teague-Penry* were improper under *Caldwell*.

The Court determined that petitioner's claim was procedurally barred and affirmed the conviction and sentence by opinion on June 21, 1990.

Charles Lane was tried by a different jury, found guilty of first degree murder and sentenced to life imprisonment. Charles Lane had no prior criminal history other than a DWI from the State of Florida. *State v. Lane*, 414 So. 2d 1223 (La. 1982). Sawyer had a prior conviction for involuntary manslaughter of a four year old child in Arkansas and was sentenced to 3 years in prison for that crime.

SUMMARY OF ARGUMENT

Sawyer, unable to overcome the procedural default in his successive and abusive petition for writ of habeas corpus, tries to resurrect the amorphous "fundamental fairness" inquiry rejected in *Smith v. Murray*, by requesting this Court to adopt his test as the standard for actual innocence of the death sentence alluded to in *McCleskey v. Zant*. However, the standard urged by Sawyer essentially would substitute a pure prejudice inquiry for the present cause and prejudice requirements consistently recognized by this Court as appropriate for successive petitions of writs of habeas corpus. Such a test would destroy all concepts of finality in sentencing as well as violate the core concepts of comity.

The application of Sawyer's proposed definition would allow the federal reviewing court to conduct its own re-weighing of the state discretionary evaluation of the appropriate sentence by the

state fact finder. Re-weighing is inappropriate and would destroy all concepts of finality in capital sentencing by permitting federal courts to re-evaluate claims every time a state prisoner alleges on habeas review that he has procured new mitigating evidence.

Moreover, the test asserted by Sawyer stands predicated on a fundamental conceptual error: The idea that one can be factually innocent of a sentence. Propriety of a sentence and factual innocence of the underlying crime are two different concepts. The actual innocence of *Kuhlmann* relates to the factual question of whether a defendant committed the crime. The propriety of the sentence by contrast presupposes guilt to the crime and merely addresses the appropriate societal response to it.

The only way a person can be innocent of the death penalty, to the extent that the term is appropriate, is by proving the person is innocent of the underlying crime which permits the consideration of the death penalty and, thus, that the person is eligible for a sentence of death. This test would be the most objective and follow the mandate of *Jackson v. Virginia*.

In Louisiana, and some other states, the capital nature of the crime is fixed at guilt by the narrowed definition of capital murder. In yet other states, a first degree murder conviction plus the presence of an aggravating factor give the underlying crime its capital nature. No test should go beyond casting doubt on this eligibility for the death penalty. Going beyond eligibility to fashion a test concerning how the fact finder might view the discretionary aspects of sentencing would circumvent the concept of "actual innocence" and replace it with an inappropriate federal re-weighing of state court capital judgments. This Court should not be drawn into that trap.

Sawyer's claims here are barred under Rule 9(b) as successive and an abuse of the writ. 28 U.S.C.A. § 2254-9(b); *McCleskey v. Zant*. Sawyer's first claim that he was denied effective assistance of counsel and an opportunity for a meaningful individualized sentencing determination was presented to the state and federal

courts on his first writs. The Fifth Circuit en banc reviewed and affirmed the claim of ineffective assistance of counsel based on a failure to prepare a competent penalty phase on Sawyer's first writ to that court. Sawyer's second claim alleges a *Brady* violation such that the prosecutor suppressed exculpatory evidence. This claim and its factual basis were never presented to any court prior to his second writ.

Sawyer fails to show cause and prejudice therefrom for his abuse of the writ. The witnesses were available for depositions and/or statements since the crime. Sawyer does not present an argument that the state obstructed his counsel from contacting these witnesses prior to his trial or his first habeas petition. In fact the state gave open file discovery to defense counsel before trial and to new counsel during the state and federal post-conviction relief stages. Sawyer does not show that he could not have obtained by reasonable means a sufficient basis to allege this claim in his first petition. Moreover, Sawyer fails to show prejudice from the omission of the details of alleged mental illness under the Louisiana sentencing scheme.

Because Sawyer cannot demonstrate cause and prejudice for having omitted the claims and facts supporting them he must show that a failure to address the merits of the claims would be a fundamental miscarriage of justice and this he cannot do.

Neither of Sawyer's claims qualifies him to be actually innocent of the death penalty under the Fifth Circuit definition such that the merits of his claims should be addressed. He does not raise any specific facts to show that he is innocent either of the murder of Fran Arwood or of both of the valid aggravating circumstances the jury found before recommending the death penalty. Moreover, Sawyer's sentencing jury heard an accurate profile in mitigation. According to the DSM-III-R, Dr. Arneson's conclusion that he was a probable sociopathic personality could have been an accurate diagnosis. The definition of sociopathic personality reflects the childhood behavior of Sawyer as established not only at trial but in the records produced by petitioner. Sawyer

is a borderline retard and his behavior throughout the years does not reflect serious impairment of his mentality. Regardless, Louisiana is not a weighing state and the jury is instructed to consider aggravating and mitigating circumstances. Mitigating evidence that does not implicate the validity of the two aggravating circumstances is insufficient to demonstrate that Sawyer is actually innocent of the death penalty.

The state had no exculpatory evidence to suppress. In support of his claims petitioner fabricates an immunity agreement, distorts the police report in regard to Wayne Shano's statement and fabricates a second can of lighter fluid. His claim rests on hearsay statements recalling incidents that happened more than ten years ago. Sawyer's proposed definition would encourage a continued manufacturing of evidence and distortion of the facts to obtain review on a successive federal writ.

Under the law of principals in Louisiana, La. R.S. 14:24, anyone who aids and abets in the commission of a crime, whether directly or indirectly, may be charged and convicted with that crime. The Louisiana Supreme Court reviewed this case for sufficiency of evidence of First Degree Murder and affirmed the conviction. The testimony at trial established that Sawyer locked the front door and had possession of the key, that he intimidated Cynthia Shano, that he actively participated in the beating, scalding, burning, and torture of Fran Arwood. Even in light of the alleged "new" evidence, Sawyer's conviction for First Degree Murder would be affirmed under the Louisiana Law of Principals and *Tison v. Arizona*.

Clearly, Sawyer has not demonstrated that a failure to address his claims would be a fundamental miscarriage of justice and the Fifth Circuit opinion should be affirmed.

ARGUMENT

I.

THE STANDARD FOR DETERMINING WHETHER THERE HAS BEEN A "FUNDAMENTAL MISCARRIAGE OF JUSTICE" IN THE DEATH SENTENCING CONTEXT, SUCH THAT A PETITIONER CAN BYPASS PROCEDURAL BARS, IS THAT THE ALLEGED ERROR MUST UNDERMINE THE ACCURACY OF THE SENTENCING DETERMINATION BY RELATING TO PETITIONER'S ELIGIBILITY FOR THE DEATH SENTENCE.

The United States District Court and the Court of Appeals for the Fifth Circuit failed to find cause that would allow consideration of Sawyer's claims in his successive petition, under *McCleskey v. Zant*, ____ U.S. ____, 111 S. Ct. 1454 (1991); 28 U.S.C.A. § 2254-9(b); and *Wainwright v. Sykes*, 433 U.S. 72 (1977). Nor did the Fifth Circuit find that Sawyer showed actual innocence of the death penalty in order to bypass the procedural bars to address his claims on the merits. Sawyer continues to embrace the language of actual innocence by emphasizing the prejudicial effect that his claims may have had upon his sentencing jury. Sawyer asserts actual innocence of the death penalty so that his claims can fall within the actual innocence exception of *McCleskey*.

This Court has established that a constitutional violation at the guilt phase, which has probably resulted in the conviction of one who is actually innocent, will allow the federal habeas court to grant the writ even in the absence of a showing of cause for the procedural default. *Murray v. Carrier*, 477 U.S. 478 (1986). Sawyer's proposed standard of actual innocence of death sentencing emphasizes the potential prejudicial effect on the jury during the discretionary process to determine the appropriateness of the death sentence. This is a totally subjective and unworkable standard that defies the objective standard applied at the guilt phase where this Court considers whether a defendant is actually innocent of the crime for which he is being tried. His standard would establish a prejudice test absent cause for the procedural default and allow the federal court to address the claims of a petitioner who is not actually alleging that he did not commit the crime. Sawyer's claims are an abuse of the writ. Louisiana

urges this Court to reject his definition.

A. Because A Large Portion Of The Sentencing Phase Is A Moral Inquiry The Definition Of "A Colorable Showing Of Factual Innocence" Of The Death Penalty Must Only Implicate Objective Factors.

Sentencing is by nature a discretionary process. Due to the gravity of a sentence of death, this Court has said that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action. *Gregg v. Georgia,* 428 U.S. 153 (1976). A capital-sentencing scheme must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder. *Zant v. Stephens,* 462 U.S. 862 (1983). The sentencer must also remain free to consider in mitigation any relevant evidence proffered by the defendant concerning his background, character, or circumstances of the crime which call for leniency. *Lockett v. Ohio,* 438 U.S. 586 (1978).

In response to the dictates of this Court, the states enacted various capital-sentencing schemes. Some narrowed the class of persons eligible for the death penalty at the definitional stage of capital murder. Other states narrowed the class at the sentencing stage. Whether or not the class eligible for the death penalty has been narrowed at the definitional stage, as in the schemes of most states, the jury is required during the sentencing phase to find at least one aggravating circumstance before it may impose death. *Lowenfield v. Phelps,* 484 U.S. 231 (1988). These sentencing schemes additionally focus on the character and record of the individual offender and the circumstances of the particular crime. *Woodson v. North Carolina,* 428 U.S. 280 (1976). This allows controlled discretion to the trier of fact to select those offenders from the eligible class for whom the death sentence is appropriate. *Gregg v. Georgia, supra.* The sentencing phase of a capital trial

continues to allow the moral inquiry that is described in *Penry v. Lynaugh,* 492 U.S. 302 (1989) by the introduction of mitigating evidence. The process of selecting those eligible defendants for whom death is appropriate is the trier of fact's "reasoned moral response" to the evidence presented by the state and the defendant. Thus, while there are constitutional safeguards present in capital sentencing not present in non-capital sentencing, capital sentencing remains a discretionary process in which there is no "correct" outcome.

In *Smith v. Murray,* 477 U.S. 527 (1986) this Court acknowledged that "actual" as distinct from "legal" innocence did not translate easily into the context of an alleged error at the sentencing phase of a trial on a capital offence. The court made clear, however, that actual innocence of the death penalty meant something more than an "amorphous 'fundamental fairness' inquiry" involving " 'substantial, colorable' constitutional claim". *Id.*, at 538.

Likewise, in *Dugger v. Adams,* 489 U.S. 401 (1989), this Court noted that "actual innocence" of the death penalty meant something more than demonstrating that an error is by its nature the kind of error that might have affected the accuracy of a death sentence and is far from demonstrating that an individual defendant is probably innocent of the sentence he or she received. These cases make clear that actual innocence of the death sentence involves a far more restrictive standard than that proposed by Sawyer which, essentially, incorporates the standard rejected in *Smith* into the innocence of the death penalty formulation. In reality, for an abuse of the writ to be excused, Sawyer suggests nothing more than a slightly heightened "prejudice" standard which, of necessity, would require federal courts to engage in re-weighing evidence to determine whether the federal judge still agreed with the state sentencer's discretionary determination. Such an approach would turn the case in which abuse of the writ is excused on the basis of actual innocence of the death penalty from the extraordinary case, "into an all too ordinary one." *Murray*

v. Carrier, 477 U.S. at 496; *Dugger v. Adams,* 489 U.S. at 411.

The only definition of a colorable showing of actual innocence which makes sense is one which implicates only those objective factors dealing with a defendant's eligibility to be sentenced to death. Innocence of a "death penalty" can only translate into being unable to receive it. Otherwise, one is speaking not of "actual innocence", but merely of the subjective issue of whether the defendant deserves a particular punishment.

There are classes of persons for whom the death penalty is absolutely unavailable. A defendant may not receive the death penalty for the rape of an adult woman. *Coker v. Georgia,* 433 U.S. 584 (1977) (Plurality;). It is unavailable for those persons who were not major participants in the underlying felony and did not exhibit reckless disregard for human life. *Tison v. Arizona,* 481 U.S. 137 (1987). Persons less than sixteen years of age when they commit the offense are ineligible for capital punishment unless the legislature includes them by the setting of a minimum age. *Thompson v. Oklahoma,* 487 U.S. ____, 108 S. Ct. 2687 (1988). People who are insane are completely immune from capital punishment for the duration of that insanity. *Ford v. Wainwright,* 477 U.S. 399 (1986). Otherwise, when considering whether, for the purpose of excusing an abuse of the writ, a person is "actually innocent" of the death penalty, this Court should dictate that federal courts may look no further than the underlying objective narrowing which creates the class of death eligible defendants.

Once a defendant falls within that narrowed group of murderers for whom death is a possible sentence either by definition of the underlying crime as capital murder, *see e.g.* La. R.S. 14:30, or by the finding of guilt to murder and the presence of one narrowing aggravating factor, the only question concerning the sentence becomes the discretionary one of the propriety of the sentence as determined by the state sentencer. This discretionary area of the fact finder's guided moral inquiry is one as to which reasonable persons from a variety of backgrounds will differ as to the weight to be given or value placed upon the evidence

proffered by the State and the defendant concerning such things as the crime, the defendant's character, background, and past criminal history and other relevant evidence.

In *Bullington v. Missouri,* 451 U.S. 430, 444 (1981), this Court noted that there is no objective measure by which the sentencer's decision can be deemed correct or erroneous so long as it is made within the authority conferred by the legislature. It would, therefore, be incongruous for this Court to permit federal courts to find a "correct" sentencing decision had or had not been rendered, or would be altered by the addition of other evidence in this realm of discretion. Rather, as both the Eleventh and Fifth Circuits have found, actual innocence of the death penalty (to the extent one can be innocent of a third party's response to an act as opposed to the act itself) can only relate to the defendant's innocence to the set of underlying circumstances (capital murder conviction, or murder plus the presence of an objective narrowing factor) which make the death sentence a possibility. *Johnson v. Singletary,* 938 F.2d 1166 (11th Cir. 1991) (en banc); *Sawyer v. Whitley,* 945 F.2d 812 (5th Cir. 1991). To propose any less stringent standard to excuse an abuse of the writ will plunge the federal courts into the quagmire of re-weighing the sentencing evidence. This Court should determine that a fundamental miscarriage of justice in the area of sentencing is limited to the objectively reviewable standard of whether the claimed error makes a colorable showing that a habeas petitioner is ineligible for the death penalty.

B. The Court Foreshadowed Limiting This Inquiry At The Sentencing Phase To The Objective Factors Setting Eligibility For The Death Penalty By Limiting The Basis For a "Colorable Showing Of Factual Innocence" At The Guilt Phase To Probative Evidence Relating To Guilt.

In *Kuhlmann v. Wilson,* 477 U.S. 436 (1986), this Court adopted a standard to effectuate the clear intent of Congress that successive federal habeas review should be granted only in rare cases, but that it should be available when the ends of justice so require. In the context of the guilt phase this Court stated,

"The prisoner may make the requisite showing by establishing that under the probative evidence he has a colorable claim of factual innocence" *Id.* 454. In the cases in which this Court has developed this concept since *Kulhmann*, it has not enlarged upon this exception to excuse an abuse of the writ as to the guilt stage of a case. There is no basis to expand this exception in the context of "actual innocence" as it relates to the sentencing phase.

In reviewing a second federal habeas corpus writ based on mixed claims in *Antone v. Dugger*, 465 U.S. 200, (1984), this Court stated that the ends of justice would not be served by consideration of those claims previously presented on federal habeas, and declared that the presentation of claims for the first time constituted an abuse of the writ. The successive claims were denied on ineffective assistance of trial counsel and that the state unjustifiabfy withheld testimony of a confidential informant. The new claims in the second writ were based on *Brady*[1]-*Agurs*[2], impropriety of the State Court, and exclusion of non-statutory mitigating factors. None of these claims went to objective factors which would effect the guilt or innocence of the petitioner. Petitioner was denied review despite allegations of ineffective assistance of counsel, *Brady* violations, impropriety of the Florida Supreme Court, and Eighth Amendment violations.

Petitioner claimed in *Delo v. Stokes*, ____U.S.____, 110 S. Ct. 1880 (1990), for the first time in a fourth federal habeas petition, that he was entitled to a lesser-included offense instruction. This Court said that the equal protection principles asserted by respondent were not novel and could have been developed long before this last minute application for a stay of execution. Thus, this Court did not consider that the lack of a jury instruction to a lesser-included offense at the guilt phase of a capital case was a fundamental miscarriage of justice such that a procedural bar should be bypassed because this issue did not

1. *Brady v. Maryland*, 373 U.S. 83 (1963).

2. *United States v. Agurs*, 427 U.S. 97 (1976).

go to the factual determination of guilt.

In *McCleskey v. Zant*,____U.S.____, 111 S. Ct. 1454 (1991), this Court reviewed a second federal habeas petition that raised for the first time a *Massiah*[3] claim. Because petitioner did not satisfy the cause and prejudice requirement to bypass the procedural bar the court reviewed the claim under the fundamental miscarriage of justice standard. Although the illegally obtained statement was erroneously introduced it did not provide cause nor did it go to objective criteria since it was truthful inculpatory evidence and in no way implicated the actual innocence of the defendant.

Another successive habeas corpus petition was rejected by this Court in *Kuhlmann v. Wilson, supra*, where incriminating statements were improperly obtained by a jailhouse informant and admitted at the guilt phase of the trial. The claim was dismissed because the petitioner failed to make a colorable showing of innocence with probative evidence relating to guilt or innocence.

Throughout these cases this Court continually stressed that the "colorable showing" must be with probative evidence relating to guilt. It failed to find a "fundamental miscarriage of justice" when the claim affected the discretion of the trier of fact, addressed factual inaccuracies not bearing on guilt, regarded improperly admitted evidence, denoted improper instructions to the trier of fact, was based on ineffective assistance of counsel and *Brady* violations. The constitutional error cannot be just factual error, nor prejudicial factual error, but must be prejudicial factual error that goes to the guilt or innocence of the petitioner.

Translating this standard for the guilt phase into the death penalty phase can only mean that the prejudicial factual error must relate to the eligibility of the petitioner for the death sentence as opposed to the more broad standard that is urged by Sawyer. Implications of this definition at the penalty phase are found in

3. *Massiah v. United States*, 377 U.S. 201 (1964).

two cases from this Court.

In a procedural default case, *Smith v. Murray*, 477 U.S. 527 (1986), the petitioner alleged that a psychiatrist's testimony regarding a previous incident on the school bus at the sentencing phase of the trial violated his privilege against self incrimination under the Fifth and Fourteenth Amendments. After this Court determined that there were no cause and prejudice for the default in this case it reviewed the claim for a fundamental miscarriage of justice. In rejecting petitioner's claim, this Court determined that the alleged constitutional error neither precluded the development of true facts nor resulted in the admission of false ones. *Id.*, at 538.

A *Caldwell*[4] claim was reviewed for the first time in a second federal habeas petition as a violation at the penalty phase in *Dugger v. Adams*, 489 U.S. 401 (1989). This Court determined that because a *Caldwell* claim was available under state law but defaulted on the direct appeal that the subsequent availability of it as a federal claim did not excuse the procedural default. Although the *Caldwell* error affected the accuracy of the death sentence it did not show that the defendant was "actually innocent" of the crime and denying the claim would not be a "fundamental miscarriage of justice." This Court's prior precedent in the area of "actual innocence" of guilt and "actual innocence", at sentencing suggest the need for a standard far more stringent than that espoused by Sawyer.

Beyond this Court's cases dealing with procedural bar, the cases dealing with the retroactivity of federal decisions likewise argue for the Fifth and Eleventh Circuits' view that the innocence exception to the death penalty be limited to eligibility to be considered for a sentence of death instead of a glorjfied federal court's re-weighing of sentencing evidence. This Court has held that given the collateral role that habeas corpus plays in the system

4. *Caldwell v. Mississippi*, 472 U.S. 320 (1985).

of justice, newly announced rules should only be given retroactive effect of habeas review when the rule places certain conduct beyond the power of the state to punish or constitutes such a watershed rule of procedure that it is implicit in the concept of ordered liberty. *Teague v. Lane*, 489 U.S. 288 (1989); *Saffle v. Parks*, 494 U.S.____ (1990); *Sawyer v. Smith*, ____ U.S.____, 110 S. Ct. 2822 (1990). This Court has made clear that state judgments are to be changed in federal review due to new law only under the most limited of circumstances. It should treat a federal court's merits review of state court judgments due to newly alleged factual claims made in successive petitions with similar reverence.

Thus, this Court's prior precedent on actual innocence of guilt as well as its retroactivity cases mandate a standard for actual innocence of the death penalty which does not permit broad inquiry into the discretionary decision making of the state sentencer but only as to objective criteria which would place the defendant beyond the power of the State to punish with a death sentence. The eligibility test espoused by the State to prove actual innocence of the death penalty would prevent wrongful, arbitrary and capricious executions without placing federal courts in the position of re-weighing aggravating and mitigating factors to determine the proper sentence under a given mixture of factors. While petitions which would qualify for this exception to Rule 9(b) would be rare, that is the very desired result set forth in *Kuhlmann* and echoed in *Dugger v. Adams*.

C. Petitioner's Definition That A Successive Claim Can Be Reviewed If There Is A Probability That The Jury Would Have Concluded That A Death Sentence Was Not Warranted Would Do Violence To The Standards Of McCleskey And Diminish The Abuse Of The Writ Doctrine.

Sawyer urges this Court to define the fundamental miscarriage of justice standard as it applies to the penalty phase of a capital case as when the sentencer was seriously misled by the alleged error and there is a probability that, absent the error, the sentencer would have concluded that a death sentence was not appropriate.

Sawyer's proposed definition suffers from the same infirmity as the definitions of the Ninth Circuit in *Deutscher v. Whitley*, 1991 WL 204454 (9th Cir. [Nev.]), and the Eighth Circuit in *Stokes v. Armontrout*, 893 F.2d 152 (8th Cir. 1989). Both Circuits require that the petitioner demonstrate constitutional error at the penalty phase which probably resulted in a verdict of death against one whom the jury (sentencer) would otherwise have sentenced to life imprisonment. *Stokes*, 893 F.2d at 156. This definition invades the discretionary area of the sentencer where it evaluates the mitigating and aggravating circumstances. Since there is no correct outcome in sentencing, even in death sentencing, applying the concept of "actual innocence" to the sentencing phase under the Eighth's and Ninth's definitions, as well as Sawyer's, is an anamorphosis. These proposed definitions require a re-weighing of the evidence from the penalty phase by a federal reviewing court, a proportionality procedure reserved for the highest court in the state. However, the standard adopted by the Courts in *Stokes* and *Deutscher* and now proposed by Sawyer constitutes nothing more than an attempt to incorporate the standard proffered in the dissent and rejected by the Court in *Smith v. Murray, supra*, into the abuse of the writ exception for capital sentencing. However, this standard, in effect, merely a restatement of prejudice, is no more valid now than it was when this Court rejected it in 1986. Moreover, this suggested standard will do real violence to the notions of finality of state court judgments and comity. Due to the speculative nature of federal review of state discretionary decisions far removed in time and position, it will not even assure a death sentence free of serious error. Rather, it would simply encourage late litigation or relitigation of factual matters, diminishing the validity and the reliability of the fact-finding process. *See, McCleskey v. Zant*, ____ U.S. ____ at *Reed v. Ross*, 468 U.S. 1, 13 (1984).

As noted earlier, the States enacted a series of differing statutes in response to the Court's Eighth Amendment cases. Some statutes require a strict balancing of factors in aggravation and mitigation, *Blystone v. Pennsylvania*, 494 U.S. ____, 110 S. Ct.

1078 (1990), others do not. *Zant v. Stephens, supra.* Of necessity, the habeas court, if it is to employ the test proposed by Sawyer, must look to the particular State statute and attempt to re-weigh the evidence in accordance with the state court procedure, an activity federal courts ought not do. In effect, the federal court would be applying state sentencing law to the federal judge's own independent view of the evidence. This federal consideration of the propriety of the sentence raises the danger of violating the state court's authority as final arbiters of state law. *Wainwright v. Goode*, 464 U.S. 78 (1985); *Spaziano v. Florida*, 468 U.S. 447 (1984). As such, it constitutes a significant affront to notions of comity. The federal courts would be required to "peer Majestically" over the shoulders of state sentencers to see if they would sentence the prisoner in the same way given the new claim concerning sentencing evidence. Such a result is contrary to the holding of *Lewis v. Jeffers*, 497 U.S. ____, 110 S. Ct. 3092 (1990).

Likewise, this standard would significantly undermine any notion of finality in the state court judgment in a capital case by making all sentencing issues subject to perpetual reargument. Litigants would be entitled, notwithstanding a failure to prove cause for the successive petition, to relitigate in a new round of federal habeas review any time they are able to hire a new, "friendly" expert, or whenever a new issue or psychological diagnosis gains favor. Virtually any legal or factual claim can be linked to the "propriety" of a habeas petitioner's sentence. Indeed, Sawyer's basic request is for this Court to adopt a standard which would permit federal re-sentencing in successive habeas, on a periodic basis to see if "death" is still an appropriate sentence according to a new federal judge, based on alleged newly procured mitigating evidence or a re-constituted claim.

An adoption of Sawyer's definition would do violence to the abuse of the writ standards just announced in *McCleskey v. Zant*. *McCleskey* limited the ability of a defendant to engage in endless rounds of habeas corpus litigation which are now the norm, rather than the exception in capital litigation. *See Woodard v. Hutchins*,

464 U.S. 377 (1984). By proposing what is, in effect, a pure prejudice standard for the fundamental miscarriage of justice exception to the abuse of the writ doctrine, Sawyer requests that this Court, after requiring a petitioner to show "cause" as well as "prejudice" in order to litigate a successive petition, erase the cause requirement. Thus, an adoption of Sawyer's proposed standard has the practical effect of abolishing the distinction between the first and subsequent habeas petitions. It will cause the exception to the 9(b) prohibition to hearing successive petitions to be the rule in the context of capital sentencing errors.

For all of the violence this standard would cause to concepts of finality, comity, and the abuse of the writ doctrine, it will not improve the reliability of the sentencing process in a capital case. Sawyer's definition permits federal re-weighing of evidence in a successive federal petition. To date this has been a matter carefully limited to state appellate courts. *Clemons v. Mississippi*, ___ U.S. ___, 110 S. Ct. 1441 (1990). *Many state* appellate courts have been very leery of re-weighing the sentencing evidence due to the perceived inability to determine accurately how the fact finder would have valued the evidence it heard and saw. *See State v. Lloyd*, 329 N.C. 662, 668, 409 S.E. 2d 218, 222 (1991).

The federal habeas court is far removed in time and position from the state sentencer who heard the evidence and observed the demeanor of the witnesses as well as the prisoner. This first hand observation of the factors which are not always made part of the printed record nevertheless goes into the making of the reasoned moral inquiry upon which a capital sentence is based. To permit the federal courts, years after the fact, to review the discretionary decisions of the state sentencer to determine if they are still "correct" undermines significantly the role of the state sentencer.

The accuracy of any such re-weighing is questionable. The accuracy of the fact-finding concerning the proffered claim on a successive habeas petition likewise is questionable. This Court noted in *McCleskey* that determinations of claims made years after

the event are subject to an erosion of reliability. The Court commented on the obvious proposition that fact finding processes are impaired when delayed.

Thus, because the standard suggested by Sawyer focuses on how the fact finder might have reacted to evidence during its discretionary determination of the sentence and not on the factual innocence of the defendant, that is, his total inability to be subjected to the sentence, the standard substitutes "prejudice" for "innocence" as the basis to permit merits review of successive habeas litigation. Such a definition would be a reversal of this Court's jurisprudence in the area of abuse of the writ and would seriously undermine this Court's concern for comity and finality.

This Court should reject Sawyer's proposed standard as well as that formulated by the Eighth and Ninth Circuits so that this Court's habeas jurisprudence will not be undercut by a standard for actual innocence of the death penalty which would swallow the rule prohibiting successive habeas review in the all encompassing exception to 9(b) in the area of capital sentencing claims.

D. The Fifth Circuit Definition Could Be Limited To Include A Showing That The Prisoner Is Actually Innocent Of The Underlying Crime That Makes Him Eligible For The Death Penalty.

The Fifth Circuit translated *Kuhlmann's* guilt-innocence phase test to the sentencing phase by requiring that the petitioner show, based on the evidence proffered plus all record evidence, a fair probability that a rational trier of facts would have entertained a reasonable doubt as to the existence of those facts which are prerequisites under state or federal law for the imposition of the death penalty. *Sawyer v. Whitley*, 945 Fed. 2d 812 (5th Cir. 1991). The core of the Fifth Circuit standard is that, after looking at all of the evidence that was and arguably should have been presented, the jury would not have been authorized to sentence him to death, *Sawyer* at 387.

The Fifth Circuit based its reasoning on the distinction that this Court has made between regular sentencing and death sentencing. It has been held that in order to comply with the Eighth Amendment a death sentence must be imposed under a structure that specifically narrows the circumstances under which it may be imposed. The court recognized in *Bullington v. Missouri,* 451 U.S. 430 (1981), the similarity between a trial on guilt or innocence and a capital sentencing proceeding as it exists in many states. It even afforded double jeopardy clause protection to one acquitted of a death penalty. *Id.* at 446.

The distinction between the two phases of a capital trial are that the guilt phase deals with objective truth which can be discovered and the sentencing phase only provides limited standards for the validity of a sentencing decision. There is no objective measure by which the sentencer's decision can be deemed correct or erroneous if it is made within the authority conferred by the legislature. *Bullington,* 451 U.S., at 444. The Fifth Circuit used the similarities to translate actual innocence into the sentencing phase and the difference is to inform the manner in which it be reviewed. The court concluded that the challenge must be to the fact which established the jury's authority to impose the death penalty. Assessing whether or not someone is actually innocent of the death penalty can only involve the assessment of whether or not the person is innocent of the crime of which he was convicted, which authorizes the imposition of death.

The broader definition, that the petitioner herein suggests, violates the core concern of *Jackson v. Virginia*[5] which was developed to insulate the discretionary function of the jury from judicial scrutiny. Thus, even in reviewing the penalty phase of a capital trial, the review should be limited to factual issues which permit the consideration of the penalty and not the discretionary part used by the fact finder to determine an appropriate sentence.

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5. *Jackson v. Virginia,* 443 U.S. 307 (1979).

The Fifth Circuit's definition could be altered to accommodate the states various schemes to include a requirement that the petitioner show that he is actually innocent of the underlying crime that makes him eligible for the death penalty. It required that the new evidence reviewed in relation to the records evidence must call into question the existence of each and every one of the aggravating circumstances found by the jury when it originally imposed the death penalty. Altering the Fifth Circuit definition to include actual innocence of the underlying crime covers those states that do not narrow the class of persons eligible for the death penalty at the definitional stage. This definition then is the most objective and follows the mandate of *Jackson v. Virginia, supra.* It avoids violating the discretionary part of the sentencing procedure by mandating the reviewing court to analyze only objective factors.

II.

WHEN REVIEWING A DEATH SENTENCE CLAIM FOR AN ABUSE OF THE WRIT UNDER THE "FUNDAMENTAL MISCARRIAGE OF JUSTICE" EXCEPTION ONLY CLAIMS THAT SHOW, BASED ON THE EVIDENCE PROFFERED PLUS ALL RECORD EVIDENCE, A FAIR PROBABILITY THAT A RATIONAL TRIER OF FACT WOULD HAVE ENTERTAINED A REASONABLE DOUBT AS TO THE EXISTENCE OF THOSE FACTS WHICH ARE PREREQUISITES UNDER STATE OR FEDERAL LAW FOR THE IMPOSITION OF THE DEATH PENALTY MAY BE REVIEWED ON THE MERITS.

A. Petitioner's Claim Is Barred Under Rule 9(b) Because It Was Addressed And Rejected By The State Courts And The Federal Courts In Sawyer's First Applications Thereto; And Because The Factual Bases For The Claim, Were Omitted From His First Writ To The Federal Courts.

Sawyer's second federal habeas petition includes mixed claims: 1. ineffective assistance of counsel as a successive claim and 2.

a *Brady* claim regarding exculpatory evidence in violation of Sawyer's Sixth, Eighth, and Fourteenth Amendment rights, a new claim. The state continues to oppose the consideration of the claims herein as an abuse of the writ under 28 U.S.C.A. § 2254 9(b) and *McCleskey v. Zant*, ____U.S.____, 111 S. Ct. 1454 (1991).

In his first claim, Sawyer alleges that he was denied effective assistance of counsel and an opportunity for a meaningful and individualized sentencing determination because trial counsel failed to investigate mitigating evidence and to obtain expert mental health testimony which he should have presented at the sentencing phase in mitigation of the death penalty. Petitioner's claim herein and the facts that support that claim were essentially reviewed and denied by the Louisiana Supreme Court on direct appeal as Claim I, II and IV, and its sentencing review under Supreme Court, Rule 12. *State v. Sawyer*, 422 So. 2d 95 (La. 1982), *reh. denied* (November 24, 1982). More developed issues were presented to the State District in the first post-conviction application as Claim II, X, XI, XIV, XV, XVI, XVIII and XXII by two new post-conviction attorneys. A review of petitioner's claims presented to the Federal District Court in his first writ of habeas corpus reveals that he presented this claim and the facts supporting it as Claim III, ineffective assistance of counsel, and Claims X-XVIII.

On appeal in the United States Fifth Circuit, Sawyer trimmed the writ to three claims which included ineffective assistance of counsel. One of the basis was a failure to prepare a competent penalty phase. The Fifth Circuit en banc denied this claim on the merits: "Of course, if Sawyer were able to show actual prejudice, he would be able to proceed under the more general fundamental fairness standard of *Donnelly v. DeChristoforo*. Yet Sawyer has not contended that such prejudice exists here, and we, after a thorough review of the record, can find none" (JA 255-256).

When a petitioner raises a claim that a federal court has already considered in a previous habeas corpus petition this Court

may review the merits of the successive claim only when the prisoner supplements his constitutional claim with a colorable showing of actual innocense. *Kuhlmann v. Wilson*, 477 U.S. 436 (1986). On the facts presented on the first claim Sawyer fails to so show.

Sawyer's second claim is procedurally defaulted because he never presented the factual basis for the *Brady* claim to the state courts nor to the federal courts on prior writs. He presents four bases for the *Brady* claim which include alleged exculpatory evidence that was suppressed by officials. Because Sawyer has presented no cause and prejudice in order to excuse his procedural default he can only address the merits of this claim if he shows that it will be a fundamental miscarriage of justice for the court to fail to review the issues. *McCleskey v. Zant, supra.*

B. Petitioner Fails To Establish Cause and Prejudice In Order To Excuse The Procedural Default.

The cause standard requires that the petitioner show that some objective factor external to the defense impeded counsel's efforts to raise the claim in state court. *Murray v. Carrier*, 477 U.S. 527 (1986). The court in *McCleskey* applied the definition of objective factors that constitute cause to address a claim in a procedural default case to claims in an abuse of a writ case: interference by officials, the factual or legal basis for a claim was not reasonably available to counsel, and ineffective assistance of counsel. Because petitioner has not alleged as cause that the factual or legal basis was not reasonably available to counsel this criteria will not be addressed here.

1. Interference By Officials.

Sawyer claims that interference by officials prevented him from obtaining exculpatory evidence favorable to the defendant.

1. An alleged immunity agreement with Cynthia Shano Schoennagel; 2. The alleged statement from Wayne Shano, the four year old son of Cynthia Shano; and 3. The discovery of another can of lighter fluid near the house was found the day

after the crime was committed. The Fifth Circuit determined that Sawyer failed to support these allegations and rejected them in *Sawyer v. Whitley, supra.*

The State gave open file discovery to the defense counsel as can be seen by the transcript of the discovery motion (JA 347) and from the affidavit of William Charles Credo, the attorney who handled this case on for the state on post-conviction relief (App. F at 13sa). As the Fifth Circuit said, there is no evidence that the state obstructed Sawyer's counsel from deposing these witnesses either at the time of his criminal trial or his first habeas petition. Petitioner's affiants were all available and continued to be available from before trial through the first federal habeas petition. There is no assertion that there was any external obstacle that barred his access to this information. Therefore, petitioner has failed to establish cause based on interference by officials. *See, Amadeo v. Zant*, 486 U.S. 214 (1988).

2. Ineffective Assistance Of Counsel.

Sawyer claims that the ineffectiveness of his trial counsel prevented him from having an opportunity for a meaningful and individualized sentencing determination because his trial counsel failed to investigate mitigating evidence and to obtain expert mental health testimony and present such in mitigation at the sentencing phase. This ground for relief was specifically raised in his first habeas petition, and the claim was rejected on its merits.

In the analysis for ineffective assistance of counsel, under *Strickland v. Washington,* 466 U.S. 668 (1984), the defendant must demonstrate a reasonable probability that, but for counsel's professional errors, the result of the proceeding would have been different. *Strickland* requires that the defendant affirmatively prove prejudice. *Id.* Sawyer in this instance fails to demonstrate prejudice by the lack of specific information regarding his hospitalization in 1966: in how that information would have affected the outcome at trial. In fact, Sawyer initially admitted to the pardon board that he became a certified river boat pilot

by passing the coast guard exam. In a second pardon hearing, he retracted that statement claiming that "he didn't understand the question." Throughout the transcript there is evidence that he worked on the river off and on during the intervening years until the 1979 crime. Moreover, we have an affidavit from his trial counsel, James Weidner, that indicates that Mr. Weidner saw no evidence of incompetency and clearly he was able to assist counsel (App. A at 1sa). Sawyer testified at the penalty phase at which time the jury had the opportunity to view his demeanor, his presentation and evaluate from external characteristic, his abilities. He never denied participating in the crime but admitted to intoxication, only remembering "bits and pieces."

The jury had information regarding Sawyer's prior behavior, his low intelligence, his personality disorder, whether accurate or not, his institutionalization, shock treatments and an abusive childhood. Petitioner clearly fails to demonstrate how the result of the proceeding would have been different by the failure to produce evidence of his prior commitments, drug medication, and alleged mental defect.

Mr. Weidner, trial counsel, clearly presented a defense of toxic psychosis based on intoxication. Both Dr. DeVilla and Dr. Arneson testified at trial for the defendant and supported this defense. Sawyer admitted at the penalty phase that he did not remember the events because he was intoxicated (JA 525). Mr. Weidner urged and developed an intoxication defense at both the guilt and penalty phases of the trial. Because it was unsuccessful does not provide cause for ineffective assistance of counsel.

In regard to the alleged failure to uncover additional medical evidence to present as mitigating evidence, Magistrate Ronald A. Fonseca aptly stated in his finding and recommendation at the District Court level:

> "Petitioner does not furnish us medical reports connected with his brief stay in a mental hospital some thirteen years prior to the commission of the crime. He does not claim he was treated for or suffered from any mental condition since that earlier hospitalization. The fact that petitioner had been hospitalized was brought out during the testimony of petitioner's witnesses during the penalty phase of the trial" (JA 113).

Magistrate Fonseca's conclusion (which found that how the jury's decision could have been affected was not demonstrated) was affirmed by the Fifth Circuit panel and the en banc court. This Court affirmed the en banc decision in June, 1990. Since these claims have previously been presented to the State court on post-conviction relief, as well as federal habeas corpus, petitioner's claims are repetitive under Louisiana Code of Criminal Procedure Article 930.4.A. Honorable Judge Tiemann denied petitioner's second application as repetitive on October 5, 1990, and the Louisiana Supreme Court denied his repetitive writ on October 7, 1990.

Because Sawyer cannot demonstrate cause and prejudice for having omitted the claims and facts supporting them, or for more fully developing the claims in his prior writs, he cannot bypass the procedural bar of abuse of the writ unless he demonstrates that a failure to address the merits of the claims would be a fundamental miscarriage of justice.

III.

PETITIONER HAS NOT ESTABLISHED A CONSTITUTIONAL CLAIM WITH A COLORABLE SHOWING OF "ACTUAL INNOCENCE" OF THE DEATH PENALTY UNDER *McCLESKEY v. ZANT* SUCH THAT A "FUNDAMENTAL MISCARRIAGE OF JUSTICE" WOULD

RESULT FROM A FAILURE TO MAINTAIN THE CLAIM.

Petitioner's first claim that his trial counsel failed to investigate mitigating evidence and obtain expert medical health testimony to present at the sentencing phase of his trial qualifies him to be actually innocent of the death penalty does not fulfill the requirements of the Fifth Circuit definition. Under the Fifth Circuit definition the petitioner must demonstrate that he is actually innocent of the death penalty by producing evidence that implicates the validity of the two aggravating circumstances which the jury found in order to impose Sawyer's death sentence. The evidence regarding mental health; brain damage, and childhood facts do not implicate the jury finding that: 1. Sawyer was engaged in the perpetuation of aggravated arson and 2. that the offense was committed in an especially heinous, atrocious and cruel manner. Nor do the facts implicate that Sawyer was actually innocent of first degree murder, La. R.S. 14:30 (Sawyer's brief, Appendix A).

Even under Sawyer's proposed definition this claim must fail because due process only requires petitioner to have access to psychiatric assistance in two instances:

> 1. at the guilt phase of a trial when defendant demonstrates that his sanity at the time of the offense is likely to be a significant factor in determining guilt; and
>
> 2. at the penalty phase when the state presents psychiatric testimony to show an aggravating factor.

See Ake v. Oklahoma, 470 U.S. 65 (1985).

Neither applies here and Sawyer is not entitled to relief. Furthermore, Sawyer is asking this Court to conduct a "psychiatric

medical malpractice review" in a federal habeas proceeding. The Ninth Circuit refused to do such in *Harris v. Vasquez*, 901 F.2d 724 (9th Cir. 1990). The Ninth Circuit also decided that *Ake* was a "new rule" of law which could not be applied retroactively to *Harris* under *Teague v. Lane, supra.* In the instant case, Sawyer's direct appeal became final in 1984. Even if he would be successful on the merits, *Ake* cannot be retroactively applied to Sawyer under *Teague-Penry*.

In *Harris, supra,* the Ninth Circuit further noted that *Harris'* claims rested on a current expert opinion based on pure speculation not probative of the fundamental fairness of this trial or competency of this counsel. As here, the three new expert reports do not give data upon which their conclusions are based that would be probative of the penalty phase or the competency of counsel. Absent is any data regarding Sawyer's behavioral manifestation since the early tests that would indicate dysfunction in mitigation. The affidavits offered here lack credibility because their conclusions are speculative and unsupported by objective evidence in the record.

Because the alleged exculpatory evidence that Sawyer claims the state suppressed does not present specific facts to show that he is innocent either of the murder of Fran Arwood or of both of the valid aggravating circumstances the jury found when it recommended the death penalty, he is not actually innocent of the death penalty.

A. Petitioner's Sentencing Jury Heard An Accurate Profile In Mitigation That Would Not Have Been Changed Substantially By The Additional Alleged "Facts".

A further review of the additional alleged facts and evidence shows that, even under petitioner's definition this evidence is hollow and distorted, and would not provide the kind of doubt in the jury's mind such that there would be a fair probability but for the alleged error the jury would not have imposed the death penalty.

1. Sawyer's Jury Heard That He Was Probably A Sociopathic Personality.

Sawyer claims that the jury heard inaccurate information and that his counsel was ineffective because Dr. Arneson concluded as a psychiatric impression that he was a probable sociopathic personality (JA 343). James Weidner, as trial counsel, had no control over the psychiatric impression of the examining psychiatrist, Dr. Genevieve Arneson. He called Dr. Arneson at trial to support the defense of intoxication.

> "A. Mr. Sawyer had drank that much alcohol and his behavior toward the victim which as described by witnesses, if his behavior as that described by a police officer who came to the house after they were called and he was simply sitting there, with his feet up near the head of the victim, that it would be my opinion that he was, he was psychotic, and it was a toxic psychosis secondary to the alcohol.
>
> Q. Dr., when a person is in a toxic psychosis are they able to form intent? A. No, not in the usual sense." (JA 474-475).

Dr. Arneson's testimony supported his defense of toxic psychosis to mitigate Sawyer's culpability in this crime. It was beyond Mr. Weidner's control that Dr. Arneson gave the psychiatric impression of probable sociopathic personality and that Mr. Boudousque, the prosecutor, cross-examined Dr. Arneson on this point. Nevertheless, the psychiatric impression of "probably sociopathic personality" may be an accurate diagnosis of Mr. Sawyer at that time in his life.

Sociopathic personality is found in the DSM-III-R under § 301.70 Antisocial Personality Disorder. The essential feature of this disorder is a pattern of irresponsible and antisocial behavior beginning in childhood or early adolescence and continuing into adulthood. The childhood signs are typically lying, stealing, truancy, vandalism, initiating fights, running away from home

and physical cruelty. In adulthood, the antisocial pattern continues and may include failure to honor financial obligations, to function as a responsible parent or to plan ahead, and an inability to sustain consistent work behavior. These people fail to conform to social norms and repeatedly perform antisocial acts that are grounds for arrest, such as destroying property, harassing others, stealing and having illegal occupation. They tend to be irritable and aggressive and to get repeatedly into physical fights and assaults including spouse-or child-beating. They generally have no remorse about the effects of their behavior on others; they may even feel justified in having hurt or mistreated others.

The DSM-III-R continues by pointing out that after the age of 30 the more flagrantly antisocial behavior may diminish, particularly sexual promiscuity, fighting and criminality. In regard to impairment, it lists that the disorder can result in failure to become an independent, self supporting adult giving rise to many years of institutionalization, more commonly penal than medical.

These criteria for antisocial personality disorder (sociopathic personality) (App. A at 1sa - Dr. William S. Weidorn, M.D.) clearly describe the accounts of Robert Sawyer and his early childhood and adolescent life. It also supports Dr. Arneson's psychiatric impression of probable sociopathic personality and would diminish the claim here that the jury heard an inaccurate or misleading characterization of Sawyer. Noteworthy is that Mr. Sawyer was about 40 years old when the current psychiatric evaluations were done and Dr. Arneson's evaluation was done about 11 years ago at which time Sawyer would have been about 29. According to the DSM-III-R this antisocial behavior may have diminished in the 11 year span between the evaluations.

Clearly, one danger in relying on new psychiatric evaluations in order to determine facts from 10 to 12 years prior is that mental conditions and personalities can change in that time span, especially if the person has been in a controlled environment such as a penal or mental institution. For this Court to rely on the most recent psychiatric evaluations to determine Mr. Sawyer's condition 11

years ago would do a grave injustice to the criminal justice system and the psychiatric evaluations at that time. Buying into a distortion of the record by giving credibility to the newest psychiatric evaluations will offend the principals of comity and finality of state criminal convictions and encourage bogus successive petitions such as this.

2. The Jury Heard The Essential Elements And Consequences Of Organic Brain Damage And Mental Retardation.

After presenting prior and recent mental health evaluations, petitioner points to the fact that only Dr. Arneson diagnosed him as being a sociopath. This fact is understandable because, according to the DSM-III-R, as previously stated Sawyer's symptoms probably diminshed in the past 10 years. The prior evaluations and treatment were done in 1965 and 1966 when petitioner was 14 and 15 years old. The current evaluations were done in 1990 when petitioner was 39 years old. Thus, it is not surprising that there is no other diagnosis of sociopathic personality except that which Dr. Arneson's performed when Sawyer was 29.

Moreover, as pointed out in the affidavit of William S. Weidorn, M.D. (App. B at 2sa), the sentencing jury heard the essentials of the diagnosis from Sawyer's teen years. There is no medical data to support the conclusions in the 1990 reports, as noted by Dr. Weidorn's affidavit. An abnormal EEG is not unusual and, in fact, Mr. Sawyer's most recent EEG was labeled normal. The description of Sawyer's hospital stay during his teen years is consistent with the description of sociopathic personality as given by Dr. Arneson at the guilt-innocence phase of Sawyer's trial (JA 478-481).

The second diagnosis came from the sanity board hearing at the time of Sawyer's trial in 1980. As Dr. Weidorn points out, the sanity board devoted themselves to following the mandate of the court: to assess whether or not Sawyer was competent to stand trial and whether or not he was competent to understand the charges against him and assist his attorney. Both psychiatrists concluded that Sawyer was competent to stand trial.

The third set of evaluations occurred in 1990, when Dr. Alec Whyte concluded that Sawyer was suffering from organic personality syndrome and mental retardation. But a review of the definition of organic personality syndrome in the DSM-III-R indicates that one can also interpret the data upon which he bases his conclusions as being suggestive of antisocial personality or of no psychiatric disease present (*See* App. B at 2sa). Dr. Whyte's affidavit is merely speculative and conclusory in nature and does not give any reason to distinguish why Sawyer suffers from organic personality syndrome as opposed to antisocial personality disorder as opposed to just plain meanness.

Moreover, Sawyer's I.Q. has measured anywhere from 68 to 73 (JA 562) and at this range he is at the highest level of mental retardation. Dr. Whyte also concludes that Sawyer functions at the 4th grade level. Essentially, Sawyer is arguing that the combination of organic personality syndrome and mild mental retardation diminishes his ability to control his impulses, to think in long range terms, and to learn from his mistakes, which affects the degree of culpability to such an extent that he should not have gotten the ultimate penalty of death.

These claims have a familiar ring that this Court has seen in *Penry v. Lynaugh*, 492 U.S. 302, 109 S. Ct. 2934 (1989). As this Court stated in *Penry* "In light of the diverse capacity and life experiences of mentally retarded persons, it cannot be said on the record before us today that all mentally retarded people, by definition, can never act with a level of culpability associated with the death penalty." *Id.*, 109 S. Ct. at 2957. The court ultimately ruled in *Penry* that a mentally retarded criminal offender with an I.Q. of 54 and a mental age of 6½ years could be sentenced to death, and impliedly, was competent to stand trial and to assist counsel in preparing the appeal of the conviction and sentence.

Furthermore, as the Classification in Mental Retardation points out:

> "The term *mental retardation*, as commonly used today, embraces a heterogeneous population, ranging from totally dependent to nearly independent people. Although all individuals so designated share the common attributes of low intelligence and inadequacies in adaptive behavior, there are marked variations in the degree of deficit manifested and the presence or absence of associated physical handicaps, stigmata, and psychologically disordered states." Classification in Mental Retardation, at 12. *Id.*, 109 S. Ct. at 2957.

The jury heard that he was a slow learner from his sister at the penalty phase. The evidence regarding his lifestyle from his nephew, his sister, and the two psychiatrists indicated that he functioned in society, held jobs, though not necessarily steadily, and was capable of entertaining and babysitting children. Nothing in the record regarding Sawyer's performance throughout the years would support the fact that his retardation would have seriously affected his culpability. Moreover, Sawyer does not offer any evidence of the general behavior of jurors with respect to sentencing mentally retarded defendants, nor of decisions of prosecutors.

As part of the 1990 evaluation, Dr. Orrin Devinsky identified that there exists an abnormality in the left frontal lobe. But in the second paragraph, the Doctor does not give any reason for his jump from an abnormality in the frontal lobe to the conclusion "compromises intellectual, emotional and behavioral functions." (JA 546).

People often suffer brain damage in the frontal lobe area which does not manifest itself in behavioral symptoms. There is no allegation in Dr. Devinsky's new report that Mr. Sawyer has not been able to function in jail, or that he has displayed any behavioral activity to indicate impaired cognitive, intellectual or

emotional function for the past ten years. Without a further factual statement, Dr. Devinsky's conclusion is without a factual basis. Moreover, the last sentence of the second paragraph in his letter is also a conclusion not supported by facts. To the contrary, Mr. Sawyer admitted at the first pardon hearing in October, 1991, that he was a licensed riverboat pilot who had passed a strict licensing test on his fifth try. He acknowledged that the average number of times to take the test before passing was six. It was also acknowledged that the test involved computational abilities which Mr. Sawyer was able to complete on the test. Dr. Whyte who was present at the hearing, admitted that when he did his report on Sawyer's functioning he did not know that he was a licensed riverboat pilot and could find no reasonable explanation to justify his report with that new information. At the second pardon hearing in November, 1991, Sawyer retracted his prior statement regarding a riverboat pilot claiming that he misunderstood the question. Yet if we look at Dr. Arneson's and Dr. DeVillier's reports he told them in 1980, that he worked as a deckhand and as a riverboat pilot. (JA 341, 344).

A review of Dr. Brad Fisher's psychological evaluation leads to the conclusion that it suffers from the same problem that the Fifth Circuit found in reviewing his report in *King v. Lynaugh*, 868 F.2d 1400, 1406 (5th Cir. 1989):

> . . . The state habeas court specifically found that Dr. Fisher's proffered affidavit lacked credibility because its conclusions concerning drug use and lack of rational capacity were extremely speculative and unsupported by objective evidence in the record.

Dr. Fisher relies on Sawyer's self serving account of his life and what happened the night of the crime, as do Doctors Devinsky and Whyte. Fisher makes speculative conclusions about what probably happened the night of the crime. He also reaches into

the realm of Sawyer's ability to differentiate between right and wrong in 1979.

Sawyer's claim herein rests on current expert opinions based on pure speculation as a result of testing and observations done eleven years after the crime. The reports are not probative of the fundamental fairness of Sawyer's trial or sentencing hearing. The conclusions are no more than speculation about Sawyer's mental condition at the time of the crime in 1979.

3. *Sawyer's Jury Heard About His Prior Hospitalization But Had It Heard The Real Reasons For That Hospitalization It Would Not Have Reached A Different Conclusion.*

The sentencing jury heard from Glenda White, Sawyer's sister, that he had been hospitalized. The clinical records give reasons for admission: "On Sunday prior to admission patient allegedly walked in on a lady in an outdoor toilet near a church and tried to choke her. Two years ago patient was accused of attempted rape. In February, 1966, patient continued to run away. His aunt felt that she could no longer control his behavior and she returned him back to Memphis." (JA 538).

The clinical record further states that the patient admitted attacking a 39 year old woman sexually. In the course of staying at the hospital he began to annoy the girls on the hospital grounds for which privileges were removed. He continued to show childish behavior and lack of responsibility and went AWOL on the day his family came to visit. The report clearly states that he does feel that nobody liked him in school, that nobody is interested in him, even though his family visits him very often and apparently are over protective of him. (JA 538-539). The physical diagnosis was that the patient is incompetent. Incompetency removed. Patient is a minor. It further stated that although the patient may adjust temporarily at home under the supervision of his parents who overprotected him he is incapable of competing in the outside world for employment. (JA 540).

Upon discharge from Western State Psychiatric Hospital after

commitment on August 16, 1966, he was labeled "was not competent." (App. J at 21sa) The certificate of his incompetency defines the meaning of "not competent" under Section 33-633, Tennessee Code Annotated. "The superintendent must certify his opinion as to whether the person is or is not competent to conduct his own affairs. In the event the person is competent to conduct his own affairs, the County Court Clerk should present the certificate to the County Judge and the statute is mandatory for the County Judge, without a hearing, to enter an order on the minutes of the county court restoring full legal rights to the person. If, in the opinion of the superintendent, the person is not competent to conduct his own affairs, the certificate should be filed as a record in the case in the office of the County Court Clerk.'

On January 10, 1967, Sawyer was released with this ruling of "not competent" at the age of 16 years old. Thus, his evaluation as not competent relates to his status as a minor and impulsive behavior. This declaration of not competent has no relationship to his mental capacity and none is indicated in the Tennessee records.

4. *Sawyer's Jury Heard A Substantial Amount Of Facts Regarding His Childhood.*

At the penalty phase, the state put on Peter Thomas, Deputy Prosecuting Attorney for the Sixth District of Little Rock, Arkansas, who introduced the indictment, conviction and commitment of Robert Sawyer for involuntary manslaughter of a four year old child in that state. The state then rested and Mr. Weidner put on Glenda White, sister of Robert Sawyer. Ms. White gave 12 pages of direct testimony describing Robert Sawyer's deprived childhood, abuse by his father, his hospitalization in state mental hospitals, shock treatments, forced drug treatment, abusive treatment by the police in his home town, his marriage and birth of his son, the estrangement between Sawyer and his son, and her knowledge of Robert's relationship with Cynthia Shano and her two boys. Ms. White also testified that she allowed

Robert to babysit with her children who loved him. Ms. White emphasized the patience that Robert had with the children as she observed it. After cross examination, Mr. Weidner put on Glen Smith, Sawyer's nephew. He too testified that he never saw Robert Sawyer cruel nor did he ever experience mistreatment at Robert Sawyer's hand. He testified that Sawyer played ball with him and took him to the movies and the park.

Sawyer himself testified and gave his account of the events that night. He never denied doing the crime but simply said he was intoxicated and could only remember bits and pieces. He also briefly described his childhood and his poor relationship with his father. (JA 525-526). Notable, at the second pardon hearing, November 1991, Sawyer recalled more details of that night: The position of Fran Arwood in the tub, how she was carried.

The additional affidavits of family members merely reiterate the story of Sawyer's abusive childhood heard by the jury. Reiteration is not additional mitigation which could have changed the jury's sentence. See *Burger v. Kemp*, 483 U.S. 776 (1987). Additional witnesses before the sentencing jury may not have changed its decision, in fact, sometimes reiteration tends to look staged and false, affirming the appropriateness of the death sentence.

5. *The Evidence Of Alleged Brain Damage, Mental Retardation And Tragic Childhood Are Unreliable And Do Not Go To The Issue Of Actual Innocence Of The Crime.*

The conclusions drawn by the doctors from the tests they ran are so speculative that they could not have made a substantial difference to the jury. Additional detail facts about Sawyer's childhood could hardly have overcome the fact that he brutally beat up a four year old child in Arkansas and was lucky to be convicted of involuntary manslaughter. Moreover, in this case, Sawyer had the key to the front door in his pocket yet made no attempt to get help. (JA 362). Sawyer took the stand and essentially never denied participating in the crime. He admitted that he was intoxicated and claimed to remember only bits and pieces of the

crime. The evidence of brain damage, mental retardation, and tragic childhood do not go to the factual innocence of the crime or of the aggravating circumstances; and do not substantially excuse his default for not presenting this evidence to the court earlier.

Petitioner misleads this Court as to the function of a Louisiana jury at the sentencing phase in regard to evaluating aggravating and mitigating circumstances. The jury at the sentencing hearing is charged to *consider* the aggravating and mitigating circumstances La C.Cr.P. Art 905.3. (App. I at 20sa). The only requirements for the jury to impose the death penalty are to find one of the statutory aggravating circumstances beyond a reasonable doubt and to consider the mitigating evidence. Because Louisiana is *not* a weighing state, any speculation on the effect that the evidence would have had upon the jury is merely speculation and could not go to the actual innocence of Sawyer regarding the crime or the statutory aggravating circumstances. The Louisiana Supreme Court performed a mandatory proportionality review and concluded that the jury's conclusion was not reached arbitrarily. (JA 30).

Initially, Sawyer presented a litany of complaints in support of his ineffective assistance of counsel claim which included counsel Weidner's alleged failure to secure his own expert witnesses in the medical field and his alleged failure to prepare properly the penalty phase at trial. The Fifth Circuit panel, as well as the en banc court, on his first federal habeas petition, concluded that Sawyer had failed to affirmatively demonstrate prejudice from the allegedly deficient actions of counsel and his ineffective assistance of counsel claim must fail. The state trial judge, in his reasons for denying post-conviction relief said that Mr. Weidner's decision in not calling more than three character witnesses was probably a strategy choice in as much as repetition tends to sound insincere. As stated by the Fifth Circuit in *Larsen v. Maggio*, 736 F.2d 215, 217 (5th Cir. 1984).

> "Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another."

It is a clear principle that petitioner must conduct a reasonable and diligent investigation aimed at all relevant claims and grounds for relief in the first federal habeas petition. This Court clearly stated that "if what petitioner knows or could discover upon reasonable investigation supports a claim for relief in the federal habeas petition, what he does not know is irrelevant. Omission of the claim will not be excused merely because the evidence discovered later might also have supported or strengthened the claim." *Jones v. Whitley*, 938 F.2d 536 (5th Cir. 1991.)

B. The State Had No Exculpatory Evidence To Suppress.

Wayne Shano, Cynthia's four year old son, was present in the house at the time of the offense. Detective Paul Livaudais interviewed the child the day after the crime. (App. G at 15sa) According to Wayne Joseph Shano, his daddy Bobby (Sawyer) hit that girl with a hammer. He showed Detective Livaudais the bedroom where the victim lay with blood coming from her mouth and face. He said daddy Bobby discarded what he used to burn the victim in the garbage bag. In this garbage bag was found a half a part of a cigarette case, silver in color. There is no documentation that any second lighter fluid can was found. Wayne then stated that this was the item used to burn the victim by his daddy Bobby. (App. G at 15sa).

Clearly, petitioner is relying on the last minute affidavit of a third party, Betty Thibodeaux, who claims that she was at the scene of the interview. The police report does not mention her but merely states that the child's mother Cynthia Shano was present. If a court lends credibility to last minute affidavits by attention seeking people that distort documented facts it encourages perpetration of false accusations.

In regard to the alleged immunity agreement Cynthia Shano denies that she was ever promised anything in exchange for her

testimony (App. D at 8sa); Phillip Boudousque, the prosecutor, also denies ever having even considered Cynthia as a suspect. (App. C at 5sa). Evidence based on hearsay affidavits from memories that are 11 years old should not be acknowledged by this or any other court. Manufacturing an immunity agreement to support a claim for a second writ is unconscionable.

In support of his claims petitioner fabricates an immunity agreement for Cynthia Shano based on hearsay and 11 year old memory. Furthermore, he misleads the court as to Wayne Shano's statements to the police as described in the police report. He also alleges a second can of lighter fluid which has never been mentioned in a prior petition. Instead, petitioner in his second writ to the district court, talked of a silver cigarette case which was found in the trash on the day following the crime. Also, in his writ to the federal district court, he tried to make a *Brady* issue from a letter which was written four months *after* the trial by an inmate acquaintance of Charles Lane to Cynthia Shano. Petitioner in that district court writ fabricated a claim by lifting a statement from the prosecutor's trial notes regarding an odor of alcohol on Shano and omitted notifying the court that the note before that one indicated that at no time was Cynthia Shano considered for prosecution. These "facts" were omitted from petitioner's brief here. His "facts" are not founded in reality but are presented to this Court as a distortion of the facts, based on last minute hearsay affidavits for the purposes of sandbagging and distorting the record. The standard of review proposed by Sawyer would encourage precisely this type of behavior in successive petitions that should be subject to sanctions.

C. Louisiana's Law of Principals.

In Louisiana, under La. R.S. 14:24[6] all persons who aid and

6. *La. R.S. 14:24 (Principals)* - All persons concerned in the commission of a crime, whether present or absent, and whether they directly commit the act constituting the offense, aid and abet in its commission, or directly or indirectly counsel or procure another to commit the crime, are principals.

abet in the commission of a crime, whether directly or indirectly, may be charged and convicted with that crime. The doctrine of principals is limited to those crimes for which a person personally has the requisite mental state. In the case of a first degree murder conviction, the requisite mental state is that the defendant had the specific intent to kill or inflict great bodily harm. It is not enough to find merely that the accomplice had the necessary mental state, since this intent cannot be imputed to the accused. *State v. Holmes*, 388 So. 2d 722 (La. 1980).

The Louisiana Supreme Court reviewed Sawyer's conviction and sentence of first degree murder for the sufficiency of evidence under the *Jackson v. Virginia* standards, *supra*. The court determined that despite the testimony of laymen and psychiatrists regarding Sawyer's allegedly intoxicated condition and its effect on his ability to form a specific intent to kill or inflict great bodily harm, the jury reasonably rejected the defense. The court found ample evidence from the testimony of the arresting officer and Ms. Shano from which a rational juror could have found defendant acted with specific intent, despite his excessive consumption of alcohol. *State v. Sawyer*, 422 So. 2d 95 (La. 1982), *reh. denied* (Nov. 24, 1982). If the alleged "essential facts" that Sawyer claimed the jury should have heard were in fact before the jury, it would not have made a difference such that a sufficiency of evidence review under the *Jackson* standard would not survive. The alleged immunity offer might be introduced as hearsay testimony by witnesses who could only repeat innuendo statements. The testimony of Diane Thibodeaux regarding Wayne Shano's statement to Paul Livaudais would be inadmissible hearsay. The alleged second can of lighter fluid could not be introduced because of the absence of facts to support its existence. The alleged abuse and neglect of Shano's children would not be admissible under relevancy. The alleged acquaintance of Charles Lane and Shano before the crime would have been overbalanced by the testimony of Shano, Thomas Champagne, Jr., and detectives who verified that Charles Lane had just met Robert

Sawyer and Cynthia that night in the lounge.

The evidence of Sawyer's organic personality syndrome with its conclusory statements not based on facts about his inability to form intent were heard through Dr. Arneson's testimony regarding specific intent and Sawyer's testimony. Dr. Arneson was called as a witness by the defense and, in answer to an inquiry regarding Mr. Sawyer's ability to form intent with his alleged degree of intoxicaition, she said, "he could not in the usual sense" (JA 474-475).

After reviewing the evidence that Sawyer wishes to introduce, the problems that he may have introducing the evidence because of lack of factual basis, hearsay and/or relevancy, the conviction and sentence of Robert Sawyer would still survive a *Jackson v. Virginia* sufficiency of evidence review.

Clearly, under Louisiana law, the evidence supported Robert Sawyer's specific intent to commit the crime based on his participation in the crime. The testimony at trial established that Robert Sawyer locked the front door and had possession of the key, that he intimidated Cynthia Shano to go to a bedroom, that he actively participated in the beating, the scalding, the burning, and the torture of Fran Arwood. This participation and failure to prevent the events support his participation in the crime such that a reasonable juror could infer from the circumstances that he had the specific intent necessary for a first degree murder conviction. Likewise, a defendant may be convicted and sentenced to the death penalty for a felony that resulted in a murder when his participation is major and his mental state is one of reckless indifference. *Tison v. Arizona*, 481 U.S. 137 (1987). The testimony in the instant case, even if the alleged essential facts proposed by Sawyer were admitted, would establish at least a reckless indifference which would support a conviction of first degree murder and a sentence of death pursuant to federal constitutional principles.

After reviewing the Louisiana law of principals and the federal jurisprudence under *Tison v. Arizona*, *supra*, it is clear that Robert Sawyer has not produced any alleged facts that could change his participation in the crime enough to eliminate his eligibility for a first degree murder conviction and sentence of death. Thus, Sawyer has failed to establish an actual innocence of the death penalty. The denial of his writ based on an abuse of the writ is not a fundamental miscarriage of justice.

CONCLUSION

After considering the foregoing law and evidence, this Court should affirm the Fifth Circuit's opinion because Sawyer has not shown that he is actually innocent of the death penalty under that definition; nor under any definition because the claims presented here are based on manufactured facts and distortions of the record.

Respectfully submitted,

JOHN M. MAMOULIDES
District Attorney
DOROTHY A. PENDERGAST*
Assistant District Attorney
Attorneys for Respondent

* *Counsel of Record*

APPENDIX A — AFFIDAVIT OF JAMES S. WEIDNER, JR.

STATE OF NORTH CAROLINA

COUNTY OF MECKLENBURG

AFFIDAVIT

Before me, the undersigned Notary Public, came and appeared James S. Weidner, Jr. and after being duly sworn did depose and state:

That he was the lead trial attorney for Robert Sawyer and did represent him at his trial for First Degree Murder. That prior to commencing the trial, Robert Sawyer gave no indication of being unable to proceed to trial. Robert Sawyer answered questions put to him, seemed to understand the nature of the proceeding, acted in an appropriate manner and gave no indication of being mentally unable to proceed with the trial.

s/ James S. Weidner, Jr.
James S. Weidner, Jr.

Sworn to on this 9th
day of October, 1990

s/ Michelle N. Meeks
Notary Public
My Commission Expires (illegible)

APPENDIX B — AFFIDAVIT OF WILLIAM S. WEIDORN, M.D.

PARISH OF JEFFERSON

STATE OF LOUISIANA

AFFIDAVIT OF WILLIAM S. WEIDORN, M.D.

SUMMARY OF REVIEW OF MEDICAL RECORDS AVAILABLE ON ROBERT SAWYER AND OBSERVATIONS OF ROBERT SAWYER AT PARDON BOARD HEARING AT ANGOLA ON OCTOBER 8, 1990

I reviewed the medical records from Robert W. Sawyer's adolescence and hospitalizations in Tennessee. I reviewed the trial transcripts of the testimony of the Sanity Board Hearing members in 1979. And I reviewed the most recent reports of 1990 by the psychiatrist, Dr. Alec Whyte, the neurologist, Dr. Orrin Devinsky and the clinical psychologist, Brad Fisher.

In essence there are three sets of diagnoses: 1) from his adolescence and hospitalization in Tennessee, 2) from the Sanity Board Hearing, 3) the most recent set of reports by the above named consultants. In his teens, he was diagnosed as suffering from schizophrenia, childhood type. This is difficult to substantiate based upon the report of that period because the reports describe his psychological functioning in such a way that schizophrenia would not be present. Further, the most recent psychological test does not show any suggestion of schizophrenia. Therefore, it is difficult to support that diagnosis. Further, during these adolescent hospitalizations, one electroencephalogram was reported as an abnormal EEG. This is a finding and not a diagnosis and in and of itself little can be made of it.

Appendix B

At the time of his trial, one of the psychiatrists raised the question of his being a sociopathic personality (in current diagnostic terminology this is now termed antisocial personality). The Sanity Board at that time devoted themselves to following the mandate of the court, that is, to assess whether or not Sawyer was competent to stand trial and whether or not he was competent to understand the charges against him and assist his attorney. According to their testimony they felt that Sawyer was able to do all of those things.

Finally, the most recent consultants of 1990 reach diagnoses of Organic Personality Syndrome and Mental Retardation. In reviewing the data one can interpret the current data as being possibly suggestive of Organic Personality Syndrome. However, one could also interpret the data as being suggestive of Antisocial Personality, and in addition, one could interpret the data as being sufficient of no psychiatric disease present. Thus, it is difficult to substantiate these formal diagnoses at this point.

The question of whether or not he is mentally retarded is also a diffucult one. Past and current psychological tests would suggest a degree of Mental Retardation. However, Mr. Sawyer's testimony at the Pardon Board Hearing was to the contrary in that he described himself as being a licensed riverboat pilot, he described himself as functioning in this capacity for a number of years, etc.

In reading the various medical documents available on Robert Sawyer, I am not able to find descriptions of abnormal behavior or abnormal psychological functioning which would be sufficiently interfering with his ability to perform in trials, at hearings, etc. Thus, even if any one of the above listed diagnoses were accurate, and it is difficult to assess any degree of accuracy for them at

this time, the question still would remain as to whether or not Robert Sawyer was able to function in his own defense and work with his attorneys in understanding the various procedures that he is involved in at this time.

In reading these reports, I am unable to find any descriptions of such limitations of his functioning regardless of the various diagnoses which have been offered over this man's lifetime.

s/ William S. Weidorn
WILLIAM S. WEIDORN, M.D.

SWORN TO AND SUBSCRIBED
BEFORE ME THIS 22ND DAY
OF OCTOBER, 1990.

s/ Dorothy A. Pendergast
NOTARY PUBLIC

APPENDIX C — AFFIDAVIT OF PHILIP J. BOUDOUSQUE

AFFIDAVIT

STATE OF LOUISIANA
PARISH OF JEFFERSON

BEFORE ME, the undersigned authority, personally came and appeared, Philip J. Boudousque', who after being duly sworn did depose and state:

I.

That he was the Assistant District Attorney for the Parish of Jefferson, who prosecuted Robert W. Sawyer for the murder of Francis Arwood.

II.

That after the arraignment, the State of Louisiana offered to Robert W. Sawyer, through his attorney of record, Wiley Beevers, an opportunity to plea to the crime of the first degree murder of Ms. Arwood and receive a mandatory life sentence without benefit of probation, parole or suspension of sentence.

III.

The offer made to Mr. Sawyer through his attorney was made only once and then for a period of limited duration, i.e., the amount of time it took for Mr. Beevers to convey the offer to Mr. Sawyer, thoroughly discuss the plea with his client and return with an answer to the District Attorneys Office.

IV.

Appendix C

That Robert W. Sawyer was only offered a plea to first degree murder with a mandatory life sentence without benefit of probation, parole or suspension of sentence because of the state's concern as to whether there was a legal basis to warrant a finding that Mr. Sawyer was engaged in an enumerated felony pursuant to La.C.C. Art. 14:30 during the course of the murder.

V.

That the District Attorney's Office for the Parish of Jefferson considered Robert W. Sawyer to be the primary instigator and the most culpable participant in the Arwood murder.

VI.

That when Robert W. Sawyer declined to plea to a mandatory life sentence without benefit of probation, parole or suspension, the state never again considered a life sentence.

VII.

That at the time the above stated offer was made and subsequently rejected, the trial court had not severed the trials of Robert W. Sawyer and Charles Lane.

VIII.

That Sawyer's decision obviated the need to make a similar offer to Charles Lane.

IX.

To affiant's knowledge, information and belief, Cynthia

Appendix C

Shano was always a cooperative witness on behalf of the state and that at no time did a representative of the District Attorney's Office ever put pressure on Ms. Shano regarding her testimony.

X.

That the affiant, as an Assistant District Attorney for the Parish of Jefferson, never considered bringing charges to a Grand Jury against Cynthia Shano regarding the Arwood murder.

s/ Philip J. Boudousque
PHILIP J. BOUDOUSQUE

SWORN TO AND SUBSCRIBED
BEFORE ME THIS 15TH DAY
OF NOVEMBER, 1989.

s/ J. William Starr
NOTARY PUBLIC

APPENDIX D — AFFIDAVIT OF CYNTHIA SCHOENNAGEL

AFFIDAVIT

STATE OF LOUISIANA
PARISH OF JEFFERSON

Before me, the undersigned authority, personally came and appeared:

CYNTHIA SCHOENNAGEL

a person of the full age of majority, who first being duly sworn did state that:

1. Prior to October 10, 1990, and since that time Nicholas Trenticosta, Sarah (last name unknown) and another female have been coming to her residence and insisting that she change her testimony in the case against Robert Sawyer, in particular to state that she had made a deal with the District Attorney's Office to avoid prosecution.

2. They have been to her residence on several occasions, often when her husband was not at home.

3. She has spoken with them on at least seven occasions and on many occasions have seen them outside of her residence and pretended not to be home.

4. On at least one occasion they have walked into her home without knocking.

Appendix D

5. On more than one occasion she has asked them to quit coming around her house and to quit harassing her to no avail.

6. On Wednesday, October 31, 1990, their last visit to her home they accused her of lying and told her she was being watched. The visit turned into a shouting match on her front porch causing the neighbors to come out to see what was going on.

7. As of this date there is a white car in front of her home which leaves each time she comes out. This vehicle has been in the neighborhood since the visits from Robert Sawyer's attorneys started.

8. She was never charged in connection with the murder of Francis Arwood and never cut a deal with the District Attorney's Office to avoid prosecution therewith.

9. She is currently under treatment for a heart condition, and taking medication. The harassment by these individuals is hazardous to her health.

s/ Cynthia Schoennagel
Cynthia Schoennagel

SWORN TO AND SUBSCRIBED BEFORE ME,
NOTARY PUBLIC, FOR AND IN THE
PARISH OF JEFFERSON, THIS 15TH DAY
OF November, 1990

s/ R. Steib, Jr.
NOTARY

APPENDIX E — AFFIDAVIT OF PAUL E. LIVAUDAIS

AFFIDAVIT

PARISH OF JEFFERSON
STATE OF LOUISIANA

BEFORE ME, the undersigned authority duly commissioned and qualified, within and for the State, personally came and appeared:

PAUL E. LIVAUDAIS

who, after being duly sworn did depose and stated:

He is and has been a police officer with the City of Gretna since May 31, 1975.

He was so employed by the City of Gretna as a police detective on September 28, 1979 and was called on to investigate an aggravated battery and burning of a 23 year-old white female at 928 Porter Street, Gretna.

The investigation was begun on September 28, 1979, and was being conducted by affiant.

On September 29, 1979, affiant telephoned Cynthia Shano, mother of Wayne Joseph Shano, who was four years of age.

Mrs. Shano stated to affiant that her son, Wayne Joseph, was present throughout the beating and burning of the victim and could tell me what actually occurred.

I met with Cynthia Shano and her son Wayne Joseph Shano at 928 Porter Street, Gretna, Louisiana on September 29, 1979.

When this officer arrived, I briefly spoke to the mother, Cynthia Shano, then spoke to Wayne Joseph Shano. Wayne Joseph was calm and very readily stated to me that "my daddy, (Bobby) hit that girl with a hammer." I asked Wayne Joseph where was his daddy when his daddy hit the girl with the hammer and Wayne Joseph immediately led me to the northeast bedroom of the residence and showed me a blood stain where according to Wayne Joseph his daddy Bobby hit the girl with the hammer and the blood had come from the girl's mouth and face.

I then asked Wayne Joseph if he saw anything else and Wayne Joseph told me that his daddy (Bobby), threw what he used to burn the girl away in the garbage bag. I was then led by Wayne Joseph to a garbage bag located in the southwest corner of the residence. This bag was full of garbage so I took the bag out to the front lawn and emptied its contents. Upon the contents falling to the ground Wayne Joseph pointed to an aluminum half of a cigarette case and stated to me that this item was used by his daddy Bobby to pour lighter fluid on the girl's body and burn her.

I then had the necessary evidence collected and left the residence.

At no time during the questioning of Wayne Joseph did Wayne Joseph implicate Mr. Lane in the beating and burning of the victim. Wayne Joseph referred to his "daddy Bobby" throughout the interview, but never was Mr. Lane mentioned. Wayne Joseph at no time told me that his daddy tried to stop Lane but only implicated his daddy Bobby (Robert Sawyer) as being the only person who beat and burned the victim Francis Arwood throughout the ordeal.

Appendix E

s/ Paul E. Livaudais
PAUL E. LIVAUDAIS

Sworn To And Subscribed
Before Me this 27th
day of November, 1990.

s/ Dorothy A. Pendergast
NOTARY PUBLIC

APPENDIX F — AFFIDAVIT OF WILLIAM C. CREDO, III

AFFIDAVIT

PARISH OF JEFFERSON
STATE OF LOUISIANA

BEFORE ME, the undersigned authority duly commissioned and qualified, within and for the State, personally came and appeared:

WILLIAM C. CREDO, III

who, after being duly sworn did depose and state:

THAT, he was the Assistant District Attorney assigned to the original habeas writ application filed by Petitioner Robert Sawyer.

THAT, in conjunction with the original state habeas proceeding, Petitioner Robert Sawyer was represented by Catherine Hancock and Elizabeth Cole.

THAT, to the best of his memory, both Ms. Hancock and Ms. Cole had open file discovery which included a full review by them of the police reports involved in the original trial of Robert Sawyer.

THAT, to the best of his knowledge, after reviewing the file in this matter, the above statements are true and correct.

s/ William C. Credo, III
WILLIAM C. CREDO, III

Appendix F

Sworn To And Subscribed
Before Me this 26th
day of November, 1990

s/ Dorothy A. Pendergast
NOTARY PUBLIC

APPENDIX G — POLICE REPORT BY PAUL LIVAUDAIS RE: WAYNE SHANO

GRETNA POLICE DEPT.

SUPPLEMENT REPORT

Complainant, Drivers, Victim or Arrestee:
Arwood, Francis

Arrest no:
N/A

Complaint no:
9-16496-79

Address of Occurance:
928 Porter Street, Gretna, La.

Original Date of Occurance:
9-28-79

Date of Supplement:
10/3/79

Address of Property Loss:
N/A

Page no:
9

Correct offense or incident classification:
N/A

Appendix G

Official, Change or incident or original report:
RS 14:27/30 Attempt Murder

Value of property recovered:
N/A

Item No.:
14

living room and kitchen. The victim was then taken from the floor put on the bed in the living room, where lighted fluid was poured on her breast and down the front of her nude body and set afire.

On Saturday the 29th day of September 1979 the undersigned officer was contacted by Cynthia Shano of 918 Porter Street, Gretna, La. Cynthia Shano stated to the undersigned officer that her four year old son Wayne Joseph was present through the whole incident that had occurred on 9-28-79, and could tell the undersigned officer what had occurred in his presence [sic]. The undersigned officer then met with Cynthia Shano and her four year old son Wayne Joseph Shano at approximately 4:00 P.M. at 918 Porter Street, Gretna, La. It was learned at this time that Wayne Joseph Shano's DOB was 2-15-76. The undersigned officer then questioned Wayne Joseph Shano in the presence [sic] of Cynthia Shano. According to Wayne Joseph Shano his Daddy Bobby hit that girl with a hammer. The undersigned officer then asked Wayne Joseph Shano to show the undersigned officer the location that the victim was when he observed his Daddy Bobby hit the girl with a hammer. Wayne Joseph Shano then led the undersigned officer to the North East bedroom and pointed to the bed and stated that blood was coming from the victim's mouth and face. (Note: A sample stain was taken from the mattress of this same bed and is listed as Exhibit #5). It was further learned

Appendix G

from Wayne Joseph Shano that his daddy Bobby discarded what he used to burn the victim, in the garbage bag. The undersigned officer was then led to the utility room which is located at the South West corner of the residence and was shown a filled garbage bag. The undersigned officer then removed the garbage bag to the front lawn and emptied the contents. While separating the contents the undersigned officer was shown by Wayne Joseph Shano a 1/2 part of a cigarette case, silver in color. Wayne Joseph Shano stated to the undersigned officer that this was the item used to burn the victim by his Daddy, Bobby. The undersigned officer was then shown a pair of green ladies panties by Cynthia Shano. Cynthia Shano stated to the undersigned officer that the green panties were the same panties worn by the victim prior to the victim taking a bath. It was also learned from Cynthia Shano that a third party may have been at the residence when the victim was beaten, scalded and burned. Cynthia Shano stated that it may be that the victim's X husband Jack Arwood was present. It was further learned from Cynthia S[illegible]hat the two Robert Sawyer and Charles Lane talked about ta[illegible]he victim to Slidell La. and finishing her off.

After finding additional evidence at the scene the undersigned officer called for a B of I Unit. At approximately 4:51 P.M. Officer D. Deauzat of the Jefferson Parish Sheriffs Office arrived. Officer Deauzat took the necessary photographs and collected the evidence for processing. The B of I Unit left the scene at approximately 5:05 P.M.

The undersigned officer secured and left the scene at approximately 5:10 P.M.

Reporting Officer:
Det. P.E. Livaudais

APPENDIX H — LETTER FROM INMATE

1-27-81

Hi Cindy

I am just writing a few lines [sic] to say hello, and I hope by the time this letter get to you it will find you in the very best of health.

Just in case you are wondering how I got your address it is from a guy name Charles Lane he said you was a wonderful friend of his and you like to write to people [sic].

I am 5'8" weigh 132½ lb. I got black hair and brown eyes and 29 years old my name is William Rausch and I like to meet new people [sic] and I like to make new friends.

Charles told me that you have two boys and they name is Wayne and Troy please mail me a picture of all three of you for I can see who I am writing to.

He also said that you look like a girl [sic] name April the one on TV. and believe me she's a fox.

Charles told me yesterday that he was getting out soon and you and him was going back together soon. He always talk about you all the time he don't know I am writing this letter because I am in my cell.

Cindy I don't [sic] mean to come between you and Charles in anyway but I would really enjoy writing to you. Charles said that you really helped him alot in court because he was able to lay alot of what he did on the other guy and that kept him from getting the death penalty [sic] so he owes [sic] you a lot for helping him.

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I hope to hear from you real soon because your letters would really [sic] mean alot to me because I don't get too [sic] many letters in here and I hope you can understand that because when you get letters in here time goes alot faster in here and without any letters time drags [sic] along. I hope that this letter don't make you mad because it is just a friendship letter. Well, I am going to let you go because I know that you got a lot to do may God bless you and may God be with you and your family

From a friend
William

P.S. Write me back soon and keep that wonderful smile [sic].

APPENDIX I — LA. C.CR.P. ART. 905.3

Art. 905.3. Sentence of death; jury findings

A sentence of death shall not be imposed unless the jury finds beyond a reasonable doubt that at least one statutory aggravating circumstance exists and, after consideration of any mitigating circumstances, determines that the sentence of death should be imposed. The court shall instruct the jury concerning all of the statutory mitigating circumstances. The court shall also instruct the jury concerning the statutory aggravating circumstances but may decline to instruct the jury on any aggravating circumstance not supported by evidence. The court may provide the jury with a list of the mitigating and aggravating circumstances upon which the jury was instructed. *Added by Acts 1976, No. 694, § 1. Amended by Acts 1985, No. 231, § 1; Acts 1988, No. 779, § 1, aff. July 18, 1988.*

APPENDIX J — RESTORATION OF MENTAL COMPETENCY FROM STATE OF TENNESSEE

REV. AUG. 61

STATE OF TENNESSEE

DEPARTMENT MENTAL HEALTH

RESTORATION OF MENTAL COMPETENCY

TO THE COUNTY COURT CLERK OF SHELBY COUNTY, TENNESSEE

IN RE: Sawyer, Robert Wayne
31-424

CERTIFICATE

In accordance with Section 33-633, Tennessee Code Annotated (Chapter ?), I Edwin M. Levy, M.D., Superintendent of Western State Hospital for the mentally ill at Bolivar, Tennessee, do hereby certify that Robert Wayne Sawyer, of Shelby County, has been a patient at this institution and was discharged as of the 25th day of December, 1966, as a patient from this institution and in my opinion the above named person at the time of discharge was not competent to conduct his own affairs.

Given under my hand at office as Superintendent of said hospital this 10 day of January, 1967.

s/ illegible
Ward Physician

Appendix J

s/ illegible
Superintendent

NOTES: Under Section 33-633, Tennessee Code Annotated, the Superintendent must certify his opinion as to whether the person is or is not competent to conduct his own affairs. In the event the person is competent to conduct his own affairs, the County Court Clerk should present the certificate to the County Judge and the statute is mandatory for the County Judge, without a hearing, to enter an order on the minutes of the County Court restoring full legal rights to the person. If, in the opinion of the Superintendent, the person is not competent to conduct his own affairs, the certificate should be filed as a record in the case in the office of the County Court Clerk.

PRIVILEGED AND CONFIDENTIAL INFORMATION
Federal Regulations Prohibits you from making further disclosure of this information.